Supreme Court, U.S.
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No. 01-510

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.* WILLIAM GARIBALDI & CARLOS SAMUEL,

Petitioners,

v.

ORLEANS PARISH SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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The Respondent, Orleans Parish School Board, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the Court of Appeals for the Fifth Circuit. Its opinion is reported at 244 F.3d 486 (CA5 2001), and its denial of the petition for rehearing *en banc* is noted at 264 F.3d 1143 (CA5 2001) (Table). The district court's opinion is reported at 46 F. Supp. 2d 546 (E.D. La. 1999).

STATEMENT OF THE CASE

Respondent Orleans Parish School Board refers the Court to the opinion of the Fifth Circuit, specifically Petitioners' Appendix at app. 2–app. 6, for an accurate statement of the case.

REASONS FOR DENYING THE WRIT

Reviewing The Issue At This Time Would Be Premature

The Fifth Circuit characterized the question before it as "Does [a Parish] School Board qualify as[] 'Any person' under the False Claims Act? . . . The issue is one of first impression for this court, and for the courts of appeal[s] generally." Pet. App. at app. 7–app. 8. As Petitioners point out at page 21 of their Petition, cases presenting the issue are in various stages of review before the Courts of Appeals for the Third, Sixth, and Seventh Circuits. The School Board respectfully suggests that it is often "desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., explicating principles underlying cert. denial).

Although one of this Court's roles is to ensure the uniformity of federal law, the Court cannot, does not, and should not always leap to eradicate disuniformity as soon as it appears. Indeed, disuniformity, at least in the short run, may be tolerable and perhaps even beneficial. Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984). Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. *Id.* The process of percolation allows a period of exploratory consideration and experimentation by lower courts before this Court ends the process with a nationally binding rule. The Court, when it decides a fully percolated issue, thus has the benefit of the experience of those lower courts. *Id.*; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 176 (2d ed. 1962) (Court's avoidance of resolution of new issue permits issue to "simmer" through the maturation of opinion).

This case, in particular, dictates caution, for no disuniformity, as yet, *exists*. That is, no inter-circuit conflict exists because no other circuit has spoken on the issue. It is possible that the Third, Sixth, and Seventh Circuits will reach the result the Fifth Circuit reached in this case, or those courts may create a circuit split that could, at that time, warrant this Court's acting to harmonize the law.

In any event, and irrespective whether the circuits ultimately split (or, for that matter, even if they reach a uniform result that this Court ultimately repudiates), the Court, by granting the petition in this case, deprives itself of the benefit of the views and analyses of many well-respected jurists.

Even Were The Court Inclined To Intervene At This Time, The Fifth Circuit Merely Applied This Court's Settled Principles

A year and a half ago, this Court explained, in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that the current version of the False Claims Act "imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-85. In support, the Court relied on *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981). In light of the False Claims Act's mandatory trebling of damages, not to mention the statutorily-mandated $5,000 per claim civil penalty imposed under 28 U.S.C. § 3729(a), the Court remarked that the "'very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.'" *Stevens*, 529 U.S. at 786 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)).

While *Stevens* involved the question whether a state or one of its agencies is a "person" for purposes of the False Claims Act—and did not involve the possibility of holding municipalities and other governmental entities liable as False Claims Act "persons"—the Court reiterated its concern with imposing punitive damages on taxpayers under *any* circumstances. *Stevens*, 529 U.S. at 785 n.15. Referring to courts of the several States, this Court noted in *Newport* that "courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Newport*, 453 U.S. at 263.

The Court quite properly recognized that imposing punitive damages on a municipality (or other local public entity) results in a "windfall to a fully compensated plaintiff," and is likely "accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267. A local governmental entity can have "no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself." *Id.* The Court concluded that considerations of history and policy "do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. . . . [and that] absolute immunity from such damages obtained at common law. . . ." *Id.* at 271.

The Fifth Circuit in this case relied directly on both *Stevens* and *Newport*, noting that "punishing a local government is pointless." Petitioners' Appendix at app. 13. Further, "[n]either the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability. Extracting damages from them . . . is supported . . . by[] '[n]either reason nor justice.'" *Id.* (quoting *Newport*, 453 U.S. at 267).

Discussing the common law municipal immunity from punitive damages, this Court has explained that "[c]ompensation was an obligation properly shared by the municipality itself, whereas punishment properly applied *only to the actual wrongdoers*." *Newport*, 453 U.S. at 263 (emphasis added). Although the School Board believes that none of its Board Members or employees acted knowingly or maliciously—indeed, the Board's membership and its staff changed on numerous occasions during the seventeen-year period of the alleged wrongdoing—even if one had so acted,

an award of punitive damages against the School Board would not punish the actor as wrongdoer. Other statutes, both federal and state, are in place to do that.

Here, the Fifth Circuit did no more than apply this Court's long-standing precedents regarding a local governmental entity's common law immunity from liability for punitive damages—and the more recent pronouncement in *Stevens* that the False Claims Act's treble damages are themselves punitive—to reach a result that follows both in logic and in common sense. Nowise does the Fifth Circuit's ruling deviate from the course this Court has charted. In sum, no concern under this Court's Rule 10 is implicated, and, accordingly, this case does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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